Trapped in the Amber: State Common Law, Employee Rights and Federal Enclaves

Chad DeVeaux
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“Have you ever seen bugs trapped in amber? . . . Well, here we are . . . trapped in the amber of this moment. There is no why.”¹

INTRODUCTION

“The common law grows like a tree,”² periodically sprouting new branches, shedding dead limbs. Stagnation is antithetical to this concept. “The continued vitality of the common law depends upon its ability to reflect contemporary community values and ethics.”³ “The dead hand of the past, where it bars rather than leads social progress, must be narrowly limited in scope.”⁴ As Oliver Wendell Holmes observed,

[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.⁵

Led by luminaries like Justice Holmes, Karl Llewellyn and Lon Fuller, the twentieth century witnessed dramatic advances in private-law jurisprudence: the virtual demise of the centuries-old doctrines of caveat emptor, contributory negligence and the tort of alienation of affections, the recognition of an implied warranty of habitability for residential dwellings, the legislative enactment of the Uniform Commercial Code.

Yet in 2011, more than a million Americans⁶ — probably several million⁷ — live

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* Assistant Professor of Law, Western State University College of Law; LL.M, Harvard University 2008; J.D., University of Notre Dame 2001; B.A., Bowling Green State University 1997.
2 Professor Lewis Sargentich invoked this metaphor during a lecture at Harvard Law School in 2007.
5 Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 461, 469 (1897).
7 See Lawrence H. Mirel, Restoration Project: Give D.C. The Vote It Once Had, WASH. POST, Mar. 21, 1999, at B01 (“Millions of people live in so-called federal enclaves, those territories that have been
and work in places governed by long-discarded nineteenth-century precepts, jurisprudential purgatories where the revenants of long-dead legal doctrines stalk the living.

We call these places federal enclaves — military bases, federal office buildings and residential complexes, post offices and national parks. Their existence stems from the Constitution’s so-called “Enclave Clause,” Article I, section 8, clause 17. This provision empowers Congress to

exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .

The Supreme Court has long recognized that so long as the surrounding state consents to the cession, Congress may establish a federal enclave for any “legitimate governmental purpose[].” When an enclave is created “the jurisdiction theretofore residing in the state passes to the United States.” State regulatory authority over the ceded property ceases and the federal authority becomes “exclusive.” This “grant of exclusive legislative power to Congress . . . by its own weight bars state regulation

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without specific congressional action.”

While the land remains legally part of the state in which it sits and enclave citizens retain the right to vote in state elections, from a regulatory standpoint enclaves “are to [the surrounding state] as the territory of one of her sister states or a foreign land.”

While enclave status extinguishes state regulatory authority, “[t]he Constitution does not command that every vestige of the laws of the [state] must vanish.” In order to insure “that no area will be left without a developed legal system” state laws “existing at the time of the [state’s] surrender of sovereignty” continue in force indefinitely “as federal laws until abrogated” by Congress. Such pre-existing state laws “lose their character as law of the state and become laws of the Union.” But post-acquisition changes in state law “are not part of the body of laws” because “Congressional action is necessary to keep it current.”

The lower federal courts have uniformly held that this principle also applies to state common-law rules in effect at the time of cession.

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13 Id.
16 State Tax Comm’n, 412 U.S. at 378.
18 Id. at 99-100.
19 Board of Supervisors v. United States, 408 F. Supp. 556, 563-64 (E.D. Va. 1976); accord Sadrakula, 309 U.S. at 100.
20 Sadrakula, 309 U.S. at 99-100.
To date, “Congress has assumed powers of legislation over more than five thousand federal enclaves of varying size throughout the United States.” Collectively, these enclaves encompass “[r]oughly thirty percent of land in the United States” — more than 659 million acres. Forty are larger than Washington, D.C. Congress created the vast majority of these enclaves between 1840 and 1940. Few have been created since the end of World War II. Absent Congressional action, state laws effective at the moment the federal government accepted jurisdiction over these lands remain in force frozen in time, like bugs trapped in amber.

Congress has kept criminal law current, enacting the Assimilative Crimes Act, “making applicable on federal enclaves criminal laws of the State in which the enclave is located.” Whenever a state alters its criminal law, the ACA incorporates the modification by reference into the federalized state law governing the enclave.

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26 Id.
28 Id.
Congress similarly incorporated contemporary state wrongful death, personal injury and workers' compensation statutes into enclave law. But Congress otherwise failed to “keep . . . current” the body of private law governing enclaves. With respect to legal areas neglected by Congress, federal enclaves have devolved into jurisprudential Jurassic Parks, “sanctuaries for the obsolete restrictions of the common law . . . .”

One such arena is labor law. More than a million people are likely employed on federal enclaves today. “Virtually all state governments provide greater employment law rights and remedies than the federal government in at least some areas.” Such state-enacted protections include:

30 Id.
33 See Stephen E. Castlen & Gregory O. Block, Exclusive Legislative Jurisdiction: Get Rid of It!, 154 M.I.L. R. EV. 113, 124 (1997) (noting that “Congress . . . has not passed legislation for enclaves relative to contracts, sales, agency, probate, guardianship, family relations, and torts not involving death or personal injury”).
• the right to higher minimum wages than those guaranteed by federal law,\textsuperscript{37}
• the right to receive overtime under circumstances not required by federal law,\textsuperscript{38}
• the right to receive benefits for dependents and domestic partners not provided by federal law,\textsuperscript{39}
• greater rights to medical leave to care for ailing family members than those provided by federal law,\textsuperscript{40}
• protections against discrimination not provided by federal law,\textsuperscript{41}
• more stringent workplace safety standards than federal law requires\textsuperscript{42} and
• common law causes of action for the termination of at-will employees that violate public policy, including whistleblowers.\textsuperscript{43}

Because nineteenth and early twentieth century precepts govern most aspects of enclave private law, civilians employed on federal enclaves typically enjoy none of these rights.\textsuperscript{44}

I do not contend that modern state labor law should necessarily extend to government employees or military personnel acting in their official capacities within an enclave. Such extension of state law might “frustrate specific [federal] objectives” for the enclave.\textsuperscript{45} But no compelling reason exists to deny civilians — and government and military officials acting in their private capacities — the application of modern private law. Today, private corporations unaffiliated with the military derive millions of dollars in revenue from transactions conducted within federal enclaves.\textsuperscript{46} A teenager employed at a fast food restaurant within an enclave ought to be entitled to the same wage and hour

\textsuperscript{37} See infra note 273 and accompanying text.
\textsuperscript{38} See infra note 278 and accompanying text.
\textsuperscript{39} See infra note 275 and accompanying text.
\textsuperscript{40} See infra note 274 and accompanying text.
\textsuperscript{41} See infra note 279 and accompanying text.
\textsuperscript{42} See infra note 281 and accompanying text.
\textsuperscript{43} See infra note 291 and accompanying text.
\textsuperscript{44} See infra notes 285 through 301 and accompanying text.
\textsuperscript{46} See Parts V and VI, infra.
and workplace safety laws as a counterpart employed just outside the boundaries of the enclave. Under the current law, she is not. A serviceman who purchases a bicycle for his child from a private retailer located on an enclave ought to enjoy the implied warranties imposed by the Uniform Commercial Code. Because most enclaves predate the adoption of the U.C.C., such sales are virtually always governed by the outmoded doctrine of caveat emptor.

I am personally acquainted with the eccentricities of federal-enclave law. As a young attorney, I represented a pro bono client facing eviction from a residential apartment in the Presidio of San Francisco, a federal enclave administered by the National Parks Service. I removed the case to federal court on the basis of federal-question jurisdiction because the law governing his suit was California’s 1872 unlawful-detainer statute, which lived on as “federalized state law.” The Presidio is a bustling commercial center in the heart of San Francisco, the site of millions of dollars of commercial transactions each year. Yet, nineteenth century private law governs most conduct there. As then-Congressman James Buchanan observed in 1823, federal enclaves represent a “palpable defect in our system” because “a great variety of actions, to which a high degree of moral guilt is attached, and which are punished . . . at the

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49 As “federalized” law, the “assimilated state [unlawful detainer] law [wa]s distinctly federal in nature,” thus “its application establishe[d] the basis for federal question jurisdiction.” Id. at 1038. My client resided in federal housing. Id. at 1038 n.7. I removed the case to federal court because I planned to challenge his eviction on due-process grounds and I preferred to make this argument before a federal forum. This strategy proved successful. Swords to Plowshares v. Kemp, 2005 WL 3882063, *1-2 (N.D. Cal. Oct. 18, 2005). While my client resided in federally subsidized housing, it should be noted that the majority of housing units on the Presidio are not subsidized and operate for profit. Dan Levy, A Green Belt in the Black: Presidio as National Park Achieves Self-Sustaining Goal 8 Years Early, S.F. CHRON., June 19, 2005, at A-1.

50 Levy, supra note 49 at A-1.
common law . . . by every State . . . may be committed with impunity [within
enclaves].” So it is with the Presidio today.

Congress and the federal courts share the blame for the nonsensical state of
enclave law. The notion that when jurisdiction is transferred from one government to
another, existing laws remain in force indefinitely is derived from international law. The
principle “assures that no area however small will be left without a developed legal
system for private rights.” But these borrowed laws are not meant to live on into
perpetuity. They are intended to serve only as a jurisprudential backstop to prevent
anarchy during the transition period. Upon accepting jurisdiction, the new sovereign
assumes the responsibility to actually govern the territory. In common-law countries, the
new sovereign’s courts likewise assume the responsibility to promulgate common-law
rules for the territory. I posit that enclave common law should not remain forever
frozen in time at the moment of cession. While state court common-lawmaking
jurisdiction is extinguished, responsibility for maintenance of enclave private law should
pass from the state to the federal courts and become a matter of federal common law.

Congress and the federal courts wholly abdicated their respective tasks. Congress
failed to enact private-law legislation for enclaves. More critically, the federal courts

52 The state of the law in the Presidio is reminiscent of the phenomenon astronomers refer to as a
singularity — the center of a black hole where the past and present collide rendering invalid the ordinary
laws of physics. Marcus Chown, Dark Matter Rockets and Black Hole Starships, NEW SCIENTIST, Nov. 28,
2009, at 36-37.
Florida territory until abrogated by Congress).
55 See Board of County Comm’rs v. Donoho, 356 P.2d 267, 271 (Colo. 1960) (asserting that adoption of
pre-existing state laws was intended to temporarily “fill the vacuum which would otherwise exist” in
enclave private law).
56 See Cornelius J. Peck, The Role of the Courts and Legislatures in the Reform of Tort Law, 48 MINN. L.
REV. 265 (1963) (arguing that courts historically assume responsibility for private-law development subject
to sporadic legislative involvement).
refused to assume responsibility for enclave common-law development.

In this Article, I argue that as federal instrumentalities, enclaves should be subject to federal common law. Moreover, because there is “no need” for enclaves to be governed by “a nationally uniform body of [common] law,”\textsuperscript{57} federal courts should use their discretion to “borrow[]”\textsuperscript{58} the common law of the surrounding state, so long as doing so does not “frustrate specific [federal] objectives” for the enclave.\textsuperscript{59} Because many aspects of state labor law, like wage and hour provisions, cannot be enacted through the common-lawmaking process, Congress should enact a statute, similar to the Assimilative Crimes Act, making state labor laws applicable to civilians employed on federal enclaves.

In Part I, I explore the origin and development of the federal-enclave doctrine from its genesis as a rule of international law adopted by the Marshall Court in 1828,\textsuperscript{60} to the Court’s most recent reaffirmation of the principle in 1973.\textsuperscript{61}

In Part II, I address Congress’ authority to assimilate contemporary state law, making such law applicable within federal enclaves. In particular, I examine federal statutes making modern state criminal codes, workers’ compensation laws and wrongful-death acts applicable in federal enclaves.

In Part III, I discuss limitations upon the authority ceded by the states to the federal government. I examine the right of states to reserve limited legislative authority as a condition of cession. In addition, I address the Supreme Court’s somewhat

\textsuperscript{59} Kimbell Foods, 440 U.S. at 728.
\textsuperscript{60} See American Insur. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828) (Spanish private law governed Florida territory until abrogated by Congress).
schizophrenic assertion that an enclave is “to [the surrounding state] as the territory of one of her sister states or a foreign land,” yet nonetheless “d[oes] not cease to be a part of [the surrounding state].” I also address the right of enclave residents to vote in state elections.

In Part IV, I address the inapplicability of modern state choice-of-law rules in litigation arising on federal enclaves. Today, many states employ “interest balancing” tests when deciding which jurisdiction’s law to apply to litigation involving “contacts” with multiple states. Because the law applicable on federal enclaves is viewed as “federal law” — notwithstanding its origin as state law — the Supremacy Clause bars states from “balancing” the enclave’s interests against those of surrounding states. The Clause dictates that the enclave’s federalized state law must be applied when the pertinent events giving rise to a suit occurred on a federal enclave even if the surrounding state possesses materially greater “interests” in the litigation’s outcome.

In Part V, I explore some of the federal-enclave doctrine’s perverse effects. Because the doctrine freezes in time existing state private law — both statutory and common law — long dead principles such as the tort of alienation of affections and the doctrine of caveat emptor live on in most enclaves as jurisprudential zombies. Meanwhile, modern innovations like comparative fault and the Uniform Commercial Code are inapplicable because post-acquisition changes in state law do not apply within enclaves absent congressional action.

In Part VI, I address the enclave doctrine’s pernicious impact upon labor law. In the latter half of the twentieth century, the vast majority of states amended their labor

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62 Id.
codes providing employees greater rights and remedies than those guaranteed by federal law. Additionally, state courts now offer employees common-law claims for relief not recognized by federal law, particularly the tort of wrongful termination in violation of public policy. States did not recognize these rights and remedies when most federal enclaves were established. Thus, federal courts routinely dismiss such claims when brought by civilian workers employed by private corporations on federal enclaves.

Finally in Part VII, I offer two solutions to the problems posed by the federal-enclave doctrine. First, I argue that the lower federal courts are incorrect in their conclusion that the federal-enclave doctrine freezes in time state common-law rules. I assert that as federal instrumentalities, enclaves fall within the ambit of federal common law. Since “no need” exists for enclaves to be governed by “a nationally uniform body of [common] law,” federal courts should use their discretion to “borrow[]” the common law of the surrounding state, for each enclave. Second, I propose that Congress enact an assimilative labor act — in the spirit of the Assimilative Crimes Act — affording the rights and remedies provided by contemporary state labor statutes to non-governmental workers employed within federal enclaves.

I. STATE LAWS IN EFFECT AT THE TIME OF FEDERAL ACQUISITION REMAIN IN FORCE INDEFINITELY UNTIL CHANGED BY CONGRESS

A. The Ballad of Mrs. McGlinn’s Cow

The genesis of the federal-enclave doctrine lies in the Supreme Court’s 1885

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66 Kimbell Foods, 440 U.S. at 728.
67 The title to this section refers to the plaintiff in Chicago, Rock Island & Pac. Railway v. McGlinn, 114 U.S. 542 (1885). The McGlinn decision fails to identify the gender or marital status of the plaintiff, McGlinn. The title’s reference to “Mrs. McGlinn” is a literary license and should not be taken literally.
opinion in *Chicago, Rock Island & Pacific Railway Co. v. McGlinn*. The decision addressed the application of a Kansas statute on the Fort Leavenworth Military Reservation, a federal enclave.

On February 22, 1875, Kansas’ legislature passed an act ceding jurisdiction over Fort Leavenworth to the federal government. The defendant, Chicago, Rock Island & Pacific Railway, operated a railroad that passed through the Reservation. In February 1881, a cow owned by the plaintiff, McGlinn, wandered onto the Reservation and was struck by one of the defendant’s trains. McGlinn brought suit under a Kansas statute enacted in 1874, which rendered railroads strictly liable for collisions with livestock if the railroad failed to enclose its tracks “with a good and lawful fence to prevent the animal from being on the road.” The defendant failed to fence its tracks on the Reservation. A jury awarded McGlinn $45 in damages, $25 for the value of the cow and $20 in attorneys’ fees. The railroad appealed the verdict, asserting that the Kansas statute had no application because the Reservation was a federal enclave. The case ultimately found its way to the Supreme Court’s docket in 1885.

The *McGlinn* Court concluded that, as a federal enclave, the United States government exercised “exclusive” jurisdiction over Fort Leavenworth. Thus, upon ceding jurisdiction to the federal government, Kansas forfeited all regulatory authority over the Reservation. But this did not end the inquiry.

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68 114 U.S. 542 (1885).
69 Id. at 544.
70 Id. at 543.
71 Id.
72 Id. at 544.
73 Id. at 543-44.
74 Id. at 543.
75 Id. at 545-46.
76 Id.
McGlinn utilized a rule of international law previously applied by the Court fifty-seven years earlier in American Insurance Co. v. Canter.\textsuperscript{77} Canter recognized “that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the . . . laws which are intended for the protection of private rights continue in force . . . until, by direct action of the new government, they are altered or repealed.”\textsuperscript{78} This “assures that no area however small will be left without a developed legal system for private rights.”\textsuperscript{79}

The Canter Court concluded that property-rights disputes in the newly acquired Florida territory were governed by Spanish property laws in effect at the time Spain ceded the territory to the United States.\textsuperscript{80} The McGlinn Court applied this principle to federal enclaves, concluding that state private-law rules in effect at the time of cession remained in force until altered by Congress.\textsuperscript{81} Kansas’ cattle-wounding law predated the federal government’s acquisition of Fort Leavenworth and Congress had taken no action

\textsuperscript{77} 26 U.S. (1 Pet.) 511 (1828).
\textsuperscript{78} McGlinn, 114 U.S. at 546-47 (citing American Insur. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828)).
\textsuperscript{79} James Stewart & Co. v. Sadrakula, 300 U.S. 94, 100 (1940) (citing McGlinn, 114 U.S. at 542).
\textsuperscript{80} Canter, 26 U.S. (1 Pet.) at 544. Of course, Spanish laws in effect at the time of Florida’s acquisition that conflict with American law — Constitutional or statutory — would terminate when the United States assumed jurisdiction. As the McGlinn Court noted:

As a matter of course, all laws . . . in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power — and the latter is involved in the former — to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. [sic.] But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed.

\textsuperscript{81} McGlinn, 114 U.S. at 542, 1006-07.
\textsuperscript{81} McGlinn, 114 U.S. at 574.
to abrogate the statute.\textsuperscript{82} Thus, the law remained in effect on the enclave as federal law, and the trial court properly entered judgment for McGlinn pursuant to that law.\textsuperscript{83}

\textbf{B. While State Laws in Effect at the Moment of Cession Live on as “Federalized” Law, Post-Acquisition Changes in State Law Have No Effect Within Federal Enclaves}

The \textit{McGlinn} doctrine recognizes that state laws in force at the time of cession not in conflict with federal law live on as “‘federalized’ state law” until abrogated by Congress.\textsuperscript{84} The Supreme Court repeatedly reaffirmed this principle in the years since deciding \textit{McGlinn}.\textsuperscript{85}

\textit{McGlinn}, like \textit{Canter}, embraces the legal fiction that Congress consciously chose to incorporate the territory’s existing private law into federal law by reference at the moment of acquisition.\textsuperscript{86} The doctrine presumes Congress’ awareness of laws in effect at the moment of cession.\textsuperscript{87} But Congressional assent cannot be inferred with respect to changes in the law made \textit{after} the state cedes regulatory authority to the federal

\textsuperscript{82} \textit{Id.}.
\textsuperscript{83} \textit{Id.}.
\textsuperscript{84} Board of Supervisors v. United States, 408 F. Supp. 556, 563-64 (E.D. Va. 1976) (citing James Stewart & Co. v. Sadrakula, 309 U.S. 94, 100 (1940); \textit{accord} Swords to Plowshares v. Kemp, 423 F. Supp. 2d 1031, 1036-37 (N.D. Cal. 2005). As the Supreme Court later summarized, \textit{McGlinn} stands for the proposition that: The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary, its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however small will be left without a developed legal system for private rights. \textit{Sadrakula}, 309 U.S. at 99-100 (citing \textit{McGlinn}, 114 U.S. at 542).
\textsuperscript{86} \textit{McGlinn}, 114 U.S. at 546-47 (citing American Insur. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828)).
\textsuperscript{87} \textit{Sadrakula}, 309 U.S. at 99-100.
government. “Since only the law in effect at the time of the transfer of jurisdiction continues in force, future statutes of the state are not a part of the body of laws in the ceded area. Congressional action is necessary to keep it current.” Accordingly, the body of private law governing an enclave in effect at the moment of cession remains in force — effectively frozen in time — until altered by Congress.

C. Lower Federal Courts Have Uniformly Held that the McGlinn Doctrine Applies to State Statutory and Common-Law Rules Alike

Lower federal courts have uniformly concluded that the McGlinn doctrine dictates that “state common law rules in effect at the time of cession,” like state statutes, “become the law of the enclave” — frozen in time — “until displaced by act of Congress.”

Courts and commentators frequently attribute this assertion to the Supreme Court’s

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88 Id. at 100.
89 Id.
decision in *Arlington Hotel Co. v. Fant.*

In *Fant*, the Court considered the application of an Arkansas statute to a tort action arising in Hot Springs National Park. Arkansas ceded exclusive jurisdiction over the park to the federal government in 1904. At the time of the transfer, Arkansas’ common law subjected innkeepers to strict liability for damages to their guests’ personal property by fire. “In 1913, the Arkansas Legislature enacted a law relieving innkeepers from liability to their guests for loss by fire unless it was due to negligence.”

In 1923, a fire destroyed the Arlington Hotel, which was located in the park. Thereafter, several guests sued the hotel’s owners in Arkansas state court seeking damages for personal property lost in the fire. Arkansas’ Supreme Court concluded that the State’s 1913 statute was inapplicable because it post-dated cession of the park to the federal government. The Arkansas court chose to apply the State’s former common-law rule, subjecting the innkeeper to strict liability. The United States Supreme Court accepted review of the case in 1929.

The *Fant* Court reaffirmed that “only the [state] law in effect at the time of the transfer of jurisdiction continues in force” and “future statutes of the state” where an

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91 278 U.S. 439 (1929). Courts and commentators have cited *Fant* for the proposition that “state common law rules in effect at the time of cession become the law of the enclave until displaced by act of Congress.” *Quadrini*, 425 F. Supp. at 88; accord *Buttery*, 177 Va. at 380 (same); *Parker*, 152 Va. at 495 (same); Michael J. Malinowski, *Federal Enclaves and Local Law: Carving Out a Domestic Violence Exception To Exclusive Legislative Jurisdiction*, 100 YALE L.J. 189, 194 (1990) (citing *Fant* for the proposition that “[s]tate . . . common law changes made subsequent to the transfer . . . have no force within the enclave unless authorized by specific congressional legislation”).
92 *Fant*, 278 U.S. at 445.
93 *Id.* at 445.
94 *Id.* at 445-46.
95 *Id.* at 446.
96 *Id.* at 449.
97 *Id.* at 445.
98 *Id.* at 446.
99 *Id.* at 445-46.
100 *Id.* at 455.
enclave is located “are not part of the body of laws” because “Congressional action is necessary to keep it current.”

But the oft-repeated assertion that the Court held that “state common law rules in effect at the time of cession become the law of the enclave until displaced by act of Congress” constitutes a fundamental misreading of Fant. The Fant Court did not consider the status of enclave common law. Rather, the sole question before the Court concerned whether a national park could constitute a federal enclave. The innkeeper asserted that “no jurisdiction . . . was conferred on the United States” because Congress could not create an enclave for such a purpose. The innkeeper relied on the canon expressio unius exclusio alterius which “express[es] one item of an associated group excludes another left unmentioned.” It argued that by enumerating the purposes for which Congress could establish enclaves — “Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings” — the Constitution prohibited the establishment of enclaves for purposes not enumerated, including national parks. Accordingly, the innkeeper asserted that the Arkansas court erred in refusing to apply the 1913 state statute because the United States never validly acquired jurisdiction over the park. Fant unanimously rejected the contention that Congress’ authority to establish federal enclaves is limited to the purposes enumerated in the Enclave Clause.

103 Fant, 278 U.S. at 449.
104 Id.
107 Fant, 278 U.S. at 449-50.
108 Id. at 454-55. The Court unequivocally reaffirmed this position in Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1930), concluding that the United States validly acquired exclusive jurisdiction over Yosemite National Park. Id. at 530. Thus, it is now well settled that Congress may establish federal enclaves within States for any “legitimate governmental purposes.” Kleppe v. New Mexico, 426 U.S. 529, 542 n.11 (1976).
Fant did not address the status of pre-existing state common law in a federal enclave.

The decision predated Erie Railroad Co. v. Tompkins by nine years. At the time of the Fant decision the Court still subscribed to the doctrine of Swift v. Tyson. Swift dictated “that federal courts ha[d] the power to use their judgment as to what the rules of common law are.” Thus, Fant cannot be read to support the proposition that courts must apply pre-existing state common law rules on federal enclaves because pursuant to the Swift doctrine, the Fant Court necessarily regarded Arkansas’ common law as non-binding authority regardless of whether the federal government exercised exclusive jurisdiction over Hot Springs National Park or not. Fant did not offer any opinion regarding the applicable common law. It merely concluded that “the cession of exclusive jurisdiction” over the park “was valid” and the Arkansas statute “modifying the liability of innkeepers passed after the cession” thus “did not extend over the ceded area.” Accordingly, Fant cannot be read for the proposition that federal courts are bound to apply state common law rules in effect at the time of an enclave’s cession.

The lower federal courts’ uniform misconstruction of Fant has wreaked more havoc than any other aspect of federal-enclave law. As I will explain in Part VII-A, infra, federal acquisition should not freeze enclave common law in time. Rather, the power to promulgate common law for the affected territory must necessarily pass from the state courts to the federal courts, becoming a matter of federal common law. While legislatures sometimes intervene to correct perceived deficiencies, responsibility for the vast majority of private-law development rests with the courts in their common-

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109 304 U.S. 64 (1938).
111 Erie, 304 U.S. at 79 (citing Swift, 41 U.S. (16 Pet.) 1).
112 Erie, 304 U.S. at 79-80.
113 Arlington Hotel Co. v. Fant, 278 U.S. 439, 440 (1929).
lawmaking function.\textsuperscript{114}

\textbf{D. Contrary to the Hopeful Claims of Some Commentators, the \textit{McGlinn} Doctrine Remains in Force}

The Supreme Court added a wrinkle to the \textit{McGlinn} doctrine with its decision in \textit{Paul v. United States}\textsuperscript{115} in 1963. \textit{Paul} addressed the applicability of regulations promulgated by California’s Department of Food and Agriculture governing the price of milk sold on three military bases located within the State.\textsuperscript{116} The Court found that the three bases each constituted federal enclaves\textsuperscript{117} and that the agency promulgated the price regulations \textit{after} California ceded jurisdiction over the bases to the federal government.\textsuperscript{118} Based on these findings, the United States asserted that the \textit{McGlinn} doctrine dictated that only the agency’s regulations in effect \textit{at the time of cession} applied to the sale of milk on the three enclaves. The Court rejected this contention.\textsuperscript{119}

\textit{Paul} deviated from the previous strict application of the federal-enclave doctrine by allowing \textit{state} administrative-agency regulations promulgated \textit{after} federal acquisition to be applied within a federal enclave.\textsuperscript{120} \textit{Paul} held that such regulations apply on the enclave if the “same basic” state enabling act\textsuperscript{121} authorizing the agency to promulgate the regulations “ha[d] been in effect [prior to] the times of [the federal] acquisitions” of the bases.

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\textsuperscript{115} 371 U.S. 245 (1963).
\textsuperscript{116} \textit{Id.} at 247. The three bases were Travis Air Force Base, Castle Air Force Base and the Oakland Army Terminal. \textit{Id.}
\textsuperscript{117} \textit{Id.} at 263-64.
\textsuperscript{118} \textit{Id.} at 268-69.
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} An enabling act is a “statute conferring powers on a[n] [administrative] agenc[y] to carry out various delegated tasks.” \textit{BLACK’S LAW DICTIONARY} 592 (2d pocket ed. 1996).
\end{flushleft}
property comprising the enclave.\textsuperscript{122} The \textit{Paul} Court was likely motivated by the fact that strict application of the \textit{McGlinn} doctrine would lead to a particularly nonsensical result. The regulations at issue imposed “price controls over [the sale of] milk.”\textsuperscript{123} The enabling act charged California’s Department of Food and Agriculture with “establish[ing] minimum producer prices at fair and reasonable levels so as to generate reasonable producer incomes that will promote the intelligent and orderly marketing of market milk”\textsuperscript{124} in light of current market conditions and rates of inflation.\textsuperscript{125} If the price regulations were frozen in time, the government-mandated prices for the sale of milk applicable when \textit{Paul} was decided in 1963 would have been those in effect when the bases were established in 1942.\textsuperscript{126} This would undermine the purpose of the statute — which was incorporated into federal law upon the enclaves’ creation — to guarantee “reasonable producer incomes” as the applicable prices could not be adjusted to account for present market conditions.\textsuperscript{127}

Some commentators have argued that \textit{Paul}’s apparent deviation from the strict rule against the application of post-acquisition state law demonstrated a repudiation of \textit{McGlinn}’s doctrine of exclusive federal jurisdiction.\textsuperscript{128} The Court’s subsequent decision in \textit{United States v. State Tax Commission of Mississippi}\textsuperscript{129} — its most recent federal-enclave opinion — proved this assertion false. The \textit{Tax Commission} Court reaffirmed

\begin{thebibliography}{9}
\bibitem{} Id. at 269.
\bibitem{} Id.
\bibitem{} Cal Food & Agr Code § 61802.
\bibitem{} Challenge Cream & Butter Ass’n v. Parker, 23 Cal. 2d 137, 141 (1943).
\bibitem{} \textit{Paul}, 371 U.S. at 266.
\bibitem{} See Cal Food & Agr Code § 61802.
\bibitem{} See \textit{e.g.}, Richard T. Altieri, Federal Enclaves: The Impact of Exclusive Legislative Jurisdiction Upon Civil Litigation, 55 MIL. L. REV. 55, 68 (1976) (“After \textit{Paul}, it appears that a state can enforce its regulations over an enclave, and thus, in effect \textit{legislate} for the enclave, provided no interference with federal law or regulation is involved.”).
\bibitem{} 412 U.S. 363 (1973).
\end{thebibliography}
*McGlinn*, holding that the Enclave Clause’s “grant of exclusive legislative power to Congress . . . by its own weight, bars state regulation without specific congressional action”130 subject only to the proposition that existing “local law[s] not inconsistent with federal policy remain[] in force until altered by national legislation.”131 State laws “adopted . . . after the transfer of sovereignty” are “without force in [an] enclave.”132

*Tax Commission* demonstrates that *Paul* does not stand for the proposition advanced by some scholars that a state can “legislate for [an] enclave, provided that no interference with federal law . . . is involved.”133 Rather, *Paul* rests on the fiction common in administrative-law decisions that “the rulemaking power granted to an administrative agency charged with the administration of [an enabling act] is not the power to make law” but rather “is the power to adopt regulations to carry into effect the will of [the Legislature] as expressed by the statute.”134 Since the expression of legislative “will” at issue in *Paul* predated the enclaves’ establishment, that “will” was incorporated into and lived on as federal law. Subsequent administrative regulations “carry[ing] into effect” that legislative “will” applied on the enclave as federal law because the enabling act manifesting it predated the transfer of sovereignty.

**E. Subsequent Cessions Expanding Existing Federal Enclaves Have Created Jurisprudential “Crazy Quilts,” Where Different (Obsolete) Laws Apply in Different Parts of the Same Enclave**

The *McGlinn* doctrine’s complexity is further compounded by the fact that the federal government has expanded most federal enclaves by piecemeal acquisition of

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130 Id. at 370.
131 Id. at 369.
132 Id.
133 Altieri, *supra* note 128 at 68 (emphasis added).
additional tracts of land over time. Because existing state law is incorporated into federal law at the *moment of cession*, the applicable private law may vary from one parcel of land to another “requir[ing] the irrational application of different law to the various components of a single [federal enclave].” The private law applicable on a particular enclave may literally be different on one side of a street than it is on the other because the United States acquired jurisdiction over the respective tracts at different times.

An analogous state of affairs exists in Indian Country. Subject to certain exceptions, the federal government exercises exclusive jurisdiction over land that is owned by Indian tribes or held in trust by the United States for the benefit of a tribe. But when title to tribal land passes to a non-Indian, federal jurisdiction is terminated and the states exercise primary jurisdiction. The result of this policy is a jurisprudential “crazy quilt” in which “isolated tracts of [property under exclusive federal jurisdiction] may be scattered checkerboard fashion over a territory otherwise under state jurisdiction.” The *McGlinn* doctrine creates the same nonsensical “crazy quilt” within most federal enclaves.

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135 Prof’l Helicopter Pilots Ass’n v. Lear Siegler Servs., 326 F. Supp. 2d 1305, 1311 n.1 (M.D. Ala. 2004); Altieri, *supra* note 128 at 88 (“most enclave areas are composed of tracts of land acquired at different times”); Castlen & Block, *supra* note 33 at 118 (“It is not unusual for property under federal control, including many military installations, to have been acquired piecemeal over extended periods of time by a variety of methods. . . . The type of existing legislative jurisdiction may vary depending on when and how the specific tract was acquired.”).

136 Board of Supervisors v. United States, 408 F. Supp. 556, 564 (E.D. Va. 1976); accord Prof’l Helicopter Pilots Ass’n, 326 F. Supp. 2d at 1311 n.1; Castlen & Block, *supra* note 33 at 118.

137 18 U.S.C. § 1151(c).

138 DeCoteau v. District Court, 420 U.S. 425, 429 n.3 (1975).

139 *Id.* at 466 (Douglas, J., dissenting).

140 *Id.* at 429 n.3.

141 Altieri, *supra* note 128 at 88 (noting that “most enclave areas are composed of tracts of land acquired at different times”).
II. **CONGRESS MAY INCORPORATE THE SURROUNDING STATE’S CONTEMPORARY LAW BY REFERENCE, MAKING SUCH LAW APPLICABLE ON ENCLAVES AS “FEDERALIZED” STATE LAW**

While “the grant of exclusive legislative power to Congress over enclaves . . . bars state regulation,” state law may nonetheless be applied within an enclave if “Congress consents to [such] state regulation.” Courts generally read congressional consent to state regulation quite narrowly.

Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the states, an authorization of state regulation is found only when and to the extent there is a clear congressional mandate, specific congressional action that makes this authorization of state regulation clear and unambiguous.

Although consent to state regulation within enclaves has been rare, Congress has exercised its power to incorporate contemporary state law to govern a few well-defined subjects.

A. **The Assimilative Crimes Act**

The first Congress recognized that the absence of state regulation threatened to render enclaves lawless territories. To avert this problem, Congress enacted the Federal Crimes Act in 1790, “defin[ing] a number of federal crimes” prohibited within enclave boundaries. Because the duty to enact comprehensive criminal codes typically rests with the states, Congress’ piecemeal enumeration of offenses proved insufficient. For this reason, in 1825 Congress enacted the first Assimilative Crimes Act (“ACA”),

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143 Id. (citing Hancock v. Train, 426 U.S. 167, 179 (1976)).
145 Id.
146 Id. at 288-89; United States v. Press Publ’g Co., 219 U.S. 1, 12 (noting that the Federal Crimes Act was insufficient because “[t]he criminal code of the United States is singularly defective and inefficient . . . .”).
“adopt[ing] for each enclave the offenses made punishable by the State in which it was situated.”147 The ACA evidenced a congressional “policy of general conformity with local [criminal] law.”148 The Act incorporated state criminal law into the “federal” law governing federal enclaves.149 The Act did not delegate any jurisdiction to the states. It dictated that violations of the surrounding state’s criminal laws constituted violations of federal law triable in federal court.150

The 1825 version of the ACA “made no specific reference to new offenses that might be added by the State after the enactment of the . . . Act.”151 Thus, enclave criminal law — like private law assimilated into federal law at the time of acquisition — became stale over time.

Due to the limitation of the [ACA] of 1825 to state laws in force at the time of its own enactment, the Act gradually lost much of its effectiveness in maintaining current conformity with state criminal laws. This result has been well called one of static conformity. To renew such conformity, Congress . . . enacted comparable Assimilative Crimes Acts in 1866 . . . in 1898 . . . in 1909 . . . in 1933, . . . in 1935, . . . [and] in 1940 . . . .152

Apparently growing weary of the need to constantly renew the ACA, Congress amended the statute in 1948 to apply to “state laws . . . enacted” both “before” and “after” the Act such that it “at once reflects every addition, repeal or amendment of a state [criminal] law.”153 The 1948 ACA immediately drew the fire of critics questioning

147 Sharpnack, 355 U.S. at 289.
148 Id.
150 Id.
151 Sharpnack, 355 U.S. at 290.
152 Id. at 291.
153 Id. at 292 (emphasis added).
Congress’ authority to incorporate future state penal statutes prospectively.\textsuperscript{154} The Supreme Court finally settled this issue ten years later with its decision in \textit{United States v. Sharpnack}.\textsuperscript{155}

In 1955, the United States indicted Gerald Sharpnack under the ACA for allegedly committing sex crimes within the boundaries of Randolph Air Force Base, a federal enclave in Texas.\textsuperscript{156} The government predicated its indictment upon alleged violations of a Texas criminal statute enacted in 1950, two years after the passage of the modern ACA.\textsuperscript{157} The defendant challenged the indictment, alleging that “Congress may not legislatively assimilate and adopt criminal statutes of a state which are enacted by the state subsequent to the enactment of the [ACA].”\textsuperscript{158}

The \textit{Sharpnack} Court began its analysis by noting “[t]here is no doubt that Congress may validly adopt a criminal code for each federal enclave . . . by copying laws defining the criminal offenses in force throughout the State in which the enclave is situated.”\textsuperscript{159} From this premise, the Court concluded that the ACA passed constitutional muster. “Having the power to assimilate the state laws Congress obviously has like power to renew such assimilation annually or daily in order to keep the laws in the enclaves current with those in the States. That being so, we conclude that Congress [acted] within its constitutional powers . . . .”\textsuperscript{160}

\textit{Sharpnack} regarded the ACA not as an improper delegation of legislative power

\textsuperscript{154} See Note, \textit{The Federal Assimilative Crimes Act}, 70 HARV. L. REV. 685, 688-89 (1957) (discussing contemporary arguments that the ACA constituted “an unconstitutional delegation of Congress’ legislative power” but ultimately arguing that the statute was constitutional).

\textsuperscript{155} 355 U.S. 286 (1958).

\textsuperscript{156} \textit{Id.} at 286.

\textsuperscript{157} \textit{Id.} at 286-87.

\textsuperscript{158} \textit{Id.} at 287.

\textsuperscript{159} \textit{Id.} at 293.

\textsuperscript{160} \textit{Id.} at 293-94.
to the states, but as an ongoing incorporation of state law. “Rather than being a
delegation by Congress of its legislative authority to the States, [the ACA] is a deliberate
continuing adoption by Congress for federal enclaves of such unpre-empted offenses and
punishments as shall have been already put in effect by the respective States for their own
government.”161

While the ACA’s critics persist,162 the Supreme Court never again questioned
Congress’ authority to incorporate future state criminal law for application within federal
enclaves. The Court traditionally scrutinizes federal penal statutes with extra care in light
of “the limited constitutional power of Congress in criminal matters.”163 Thus, Congress
plainly possesses plenary power to enact non-criminal statutes “continu[ally] adopt[ing]”
other aspects of state law for application within federal enclaves.

B. Other Federal Assimilative Acts

Following in the well-lain path of the Assimilative Crimes Act, Congress enacted
a handful of statutes “continu[ally] adopt[ing]”164 other aspects of contemporary state law
for application within federal enclaves. Federal laws now make state workers’
compensation statutes,165 wrongful-death acts166 and personal injury laws167 applicable
within federal enclaves. In addition, in 1947, Congress enacted the Buck Act,
authorizing states to collect income tax from individuals employed on federal enclaves

161 Id.
162 Kristina Daugirdas, International Delegations and Administrative Law, 66 Md. L. Rev. 707, 731
(2007); Joshua D. Sarnoff, Cooperative Federalism, the Delegation of Federal Power, and the
164 Sharpnack, 355 U.S. at 293-94.
167 Id.
within their borders.\textsuperscript{168}

While Congress should be lauded for enacting these statutes, such piecemeal legislation falls far short of adequately governing the nation’s enclaves. Congress has failed to implement modern state law in the areas of employment law,\textsuperscript{169} housing law,\textsuperscript{170} consumer protection,\textsuperscript{171} contracts, agency, probate, guardianship, family relations and

\textsuperscript{168} 4 U.S.C. § 106.

\textsuperscript{169} Swords v. Kemp, 423 F. Supp. 2d 1031, 1037-38 (N.D. Cal. 2005). The states have enacted Unlawful Detainer statutes permitting expedited proceedings to evict individuals from rental housing. \textit{See e.g., Cal. Code Civ. Proc.} § 1161, \textit{et seq}. Because these provisions conflict with the federal rules of civil procedure, they are inapplicable in federal court; thus removal proceedings which take a few months in state court, can be prolonged for years in federal court. S.S. Silberblatt, Inc. \textit{v. U.S. Postal Serv.}, 2000 WL 61295, *3 (9th Cir. Jan. 21, 2000); Traverso v. Clear Channel Outdoor Inc., 2007 WL 3151449, *1-2 (Oct. 26, 2007 N.D. Cal.).

non-injury torts.\textsuperscript{172} In these arenas, outmoded nineteenth and early twentieth century state laws prevail in most enclaves. Federal neglect has relegated these enclaves into “sanctuar[ies] for the obsolete restrictions of the common law . . . .”\textsuperscript{173}

III. LIMITATIONS UPON STATE Cessions of Jurisdiction

A. States May Reserve Limited Legislative Authority Over Federal Enclaves as a Condition of Cession

It is well settled that in giving its consent to federal acquisition of an enclave a “[s]tate may qualify its cession by reservations [of jurisdiction] not inconsistent with the governmental uses.”\textsuperscript{174} In James v. Dravo Contracting Co.,\textsuperscript{175} the Supreme Court considered the permissible scope of such reservations. In 1931, the United States acquired jurisdiction over land beneath and adjacent to the Ohio River for the construction of a dam and locks to facilitate navigation.\textsuperscript{176} In the statute consenting to the federal government’s acquisition, West Virginia expressly reserved the right to exercise “concurrent jurisdiction” over the acquired property.\textsuperscript{177} Later, the State sought to tax a general contractor conducting business within the cession.\textsuperscript{178} The Dravo Court upheld West Virginia’s authority to impose the tax because the State validly reserved the right to exercise this power as a term of cession.\textsuperscript{179}

Unfortunately, West Virginia’s expansive reservation of jurisdiction is an anomaly. In most instances, states have simply reserved the right to serve criminal and

\textsuperscript{172} Castlen & Block, \textit{supra} note 33 at 124.
\textsuperscript{175} Id. at 137-38.
\textsuperscript{176} Id. at 144.
\textsuperscript{177} Id. at 137.
\textsuperscript{178} Id. at 149.
civil process within ceded territory. As the Supreme Court explained, these routine reservations of jurisdiction are simply intended “to prevent [an enclave] from becoming an asylum for fugitives from justice.”

Additionally, once a state has ceded exclusive jurisdiction to the United States it cannot attempt to retroactively reassert authority not claimed in the act of cession. In *United States v. Unzeuta*, the Supreme Court addressed a Nebraska statute seeking to retroactively reclaim concurrent criminal and civil jurisdiction over the Fort Robinson Military Reservation, a federal enclave. *Unzeuta* struck down the statute, concluding that after a state cedes exclusive jurisdiction over an enclave to the federal government, prior state jurisdiction “cannot be recaptured by the action of the State alone . . . .” Congressional acquiescence is required for a state to reclaim jurisdiction not reserved at the time of cession.

**B. Enclaves Remain Legally Part of the Surrounding State Notwithstanding Their Jurisdictional Status**

Because a state’s assent to transfer exclusive jurisdiction terminates its regulatory authority over an enclave, in the past many courts concluded that such property “cease[s]
to be part of [the surrounding state].”\textsuperscript{187} The Supreme Court rejected this reasoning as fallacious in \textit{Howard v. Commissioners of the Sinking Fund}.\textsuperscript{188} In that case, the Court addressed the purported annexation of a federal enclave by the city of Louisville, Kentucky.\textsuperscript{189}

In 1947 Congress enacted the Buck Act, authorizing states to collect income taxes from individuals employed on federal enclaves within their borders.\textsuperscript{190} Shortly after passage of the Act, the city of Louisville enacted an ordinance annexing adjacent territory, including Naval Ordinance Station Louisville,\textsuperscript{191} a federal enclave established in 1941.\textsuperscript{192} Upon annexing the station, the City began taxing the incomes of workers employed there.\textsuperscript{193}

A group of station employees challenged the annexation and the income tax, asserting that the enclave “could not be annexed by the City since it ceased to be a part of the Commonwealth of Kentucky when exclusive jurisdiction over it was acquired by the United States.”\textsuperscript{194} The Supreme Court rejected this contention.

When the United States, with the consent of Kentucky, acquired the property upon which the Ordinance Plant is located, the property did not cease to be a part of Kentucky. The geographical structure of Kentucky remained the same. In rearranging the structural divisions of the Commonwealth, in accordance with state law, the area became a part of the City of Louisville, just as it remained a part of the County of Jefferson and the Commonwealth of Kentucky.\textsuperscript{195}

\textsuperscript{187} \textit{Howard v. Commissioners of the Sinking Fund}, 344 U.S. 624, 626 (1953) (referring to a decision by a Kentucky trial court).
\textsuperscript{188} 344 U.S. 624 (1953).
\textsuperscript{189} \textit{Id.} at 624-25.
\textsuperscript{191} \textit{Howard}, 344 U.S. at 624-25.
\textsuperscript{192} http://www.globalsecurity.org/military/facility/louisville.htm. The \textit{Howard} decision never states the formal name of the station.
\textsuperscript{193} \textit{Howard}, 344 U.S. at 625.
\textsuperscript{194} \textit{Id.} at 626.
\textsuperscript{195} \textit{Id.} at 626-27.
Because the station legally remained a part of Kentucky, the State retained the power to “conform its municipal structures to its own plan, so long as the state d[id] not interfere with the exercise of [exclusive] jurisdiction within the federal area by the United States.”\textsuperscript{196} The Court concluded that “[a] change in municipal boundaries d[oes] not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property.”\textsuperscript{197} Because the annexation was proper, the Buck Act empowered the City to tax the income of the enclave’s employees.\textsuperscript{198}

While \textit{Howard} purported to lay to rest the then century-old fiction that a federal enclave constitutes “a state within a state,”\textsuperscript{199} the Court reaffirmed the proposition that the Constitution vested “the United States power to exercise exclusive jurisdiction within the area,” notwithstanding the municipal boundaries drawn by the State.\textsuperscript{200} Kentucky only possessed the authority to tax incomes earned within the enclave because Congress authorized it to do so.\textsuperscript{201} Otherwise, the State possessed no \textit{real} power to regulate activities within the territory.\textsuperscript{202} \textit{Howard’s} conclusion that an enclave \textit{legally} remains part of the surrounding state is primarily a semantic distinction. As the Court explained in its most recent enclave decision, from a regulatory standpoint enclaves “are to [the surrounding state] as the territory of one of her sister states or a foreign land.”\textsuperscript{203}

\textsuperscript{196} Id. at 627.
\textsuperscript{197} Id.
\textsuperscript{198} Id. at 628-29.
\textsuperscript{199} Id. at 627. The Court’s conclusion that federal enclaves legally remain part of the surrounding state is difficult to square with the fact that the District of Columbia is a federal enclave and Congress’ power to create the District derived from the Enclave Clause. Paul v. United States, 371 U.S. 245, 263 (1963).
\textsuperscript{200} Howard, 344 U.S. at 627 (emphasis added).
\textsuperscript{201} Id. at 628-29.
\textsuperscript{202} Id. at 627.
C. Enclave Residents Retain the Right to Vote in State Elections

The notion commonly embraced before Howard that enclaves “ceased to be part of [the surrounding state]” imposed an additional consequence upon residents of federally governed territory: states routinely denied enclave residents the right to vote in local elections. The Supreme Court struck down this century-old limitation in Evans v. Cornman. Evans addressed an action brought by residents of the National Institutes of Health, a federal enclave located in Maryland, alleging that the State wrongfully denied them the right to vote. Relying on two grounds, the Court found that the Constitution guaranteed N.I.H. residents the right to vote in State elections, notwithstanding the facility’s enclave status.

First, Evans concluded that State authorities improperly relied upon the assumption that the appellees were “not residents of Maryland” because “the N.I.H. grounds ceased to be part of Maryland when the enclave was created.” Because Howard unequivocally rejected the “fiction” than an enclave constituted “a state within a state” this argument was untenable and thus “c[ould not] be resurrected . . . to deny appellees the right to vote.”

Second, the Court found that N.I.H. residents possessed great interests in the outcome of State elections because Congress assimilated several components of

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204 Howard, 344 U.S. at 626 (referring to a decision by a Kentucky trial court).
205 E.g., Langdon v. Jaramillo, 80 N.M. 255 (1969) (denying enclave residents the right to vote on the ground that the State had no jurisdiction over them); Herken v. Glynn, 151 Kan. 855 (1940) (same); State ex rel. Lyle v. Willett, 117 Tenn. 334 (1906) (same); McMahon v. Polk, 10 S.D. 296 (1897) (same); Sinks v. Reese, 19 Ohio St. 306 (1870) (same); Opinion of the Justices, 42 Mass. 580 (1841) (same).
207 Id. at 421-22.
208 Id.
209 Id. (citing Howard, 344 U.S. at 627).
contemporary Maryland law into the federalized state law that governed the enclave.\textsuperscript{210} N.I.H. residents were subject to Maryland’s criminal law, its workers’ compensation statute, its wrongful-death act and its income taxes.\textsuperscript{211} Thus, “residents of the N.I.H. grounds [were] just as interested in and connected with [Maryland’s] electoral decisions as . . . their neighbors who live[d] off the enclave.”\textsuperscript{212} By denying suffrage to the enclave’s residents, Maryland literally subjected them to “taxation without representation.”\textsuperscript{213}

Evans ultimately concluded that the Constitution guaranteed enclave residents the right to vote notwithstanding the exercise of “exclusive federal jurisdiction”\textsuperscript{214} because the “differences . . . between . . . residents that live on federal enclaves and those who [live in the surrounding state] are far more theoretical than real.”\textsuperscript{215}

IV. THE SUPREMACY CLAUSE BARS COURTS FROM APPLYING MODERN CHOICE-OF-LAW BALANCING TESTS WITH RESPECT TO CLAIMS ARISING FROM CONDUCT OR TRANSACTIONS WITHIN FEDERAL ENCLAVES

Modern choice-of-law rules frequently authorize courts to apply a state’s law to an action arising from conduct that did not occur in that state.\textsuperscript{216} For example, if two New York drivers have an accident on a Michigan highway, a New York court will likely apply New York law in a resulting lawsuit.\textsuperscript{217} The court would apply \textit{New York} law notwithstanding the fact that the accident took place in \textit{Michigan}, because New York

\textsuperscript{210} Evans, 398 U.S. at 423-24.
\textsuperscript{211} Id at 424.
\textsuperscript{212} Id. at 426.
\textsuperscript{214} Evans, 398 U.S. at 424.
\textsuperscript{215} Id. at 425.
possesses a materially greater “interest” in the outcome of an action between two New Yorkers.\textsuperscript{218} Courts applying this standard generally determine the applicable law by “balancing” the relative interests of the states possessing “contacts” with the action.\textsuperscript{219}

Enclaves “are to [the surrounding state] as the territory of one of her sister states . . . .”\textsuperscript{220} Thus, if two New Yorkers who reside outside a federal enclave engage in litigation arising from an incident that occurred within an enclave, one might be tempted to argue that the court should apply modern New York law rather than the enclave’s “federalized state law” because New York possesses a greater “interest” in the litigation’s outcome. But this is not so.

Enclave law, unlike state law, is distinctly “federal” in nature, notwithstanding the fact that it usually originated as state law.\textsuperscript{221} As such, the Constitution’s Supremacy Clause precludes courts from balancing such competing interests because federal law, when constitutionally authorized, always supersedes State law.\textsuperscript{222} “The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, mak[ing] federal law paramount . . . .”\textsuperscript{223}

This principle bars the application of the interest-balancing tests employed by most states in choice-of-law cases.\textsuperscript{224} The Supremacy Clause dictates that courts apply the traditional \textit{lex loci} doctrine to transactions arising on federal enclaves. That doctrine

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\textsuperscript{218} Id.
\textsuperscript{221} James Stewart & Co. v. Sadrakula, 309 U.S. 94, 100 (1940).
\textsuperscript{222} Hancock v. Train, 426 U.S. 167, 178 (1976).
\textsuperscript{223} Viva! Int’l Voice for Animals v. Adidas Promotional Retail Operations, Inc., 162 P.3d 569, 571 (Cal. 2007).
\textsuperscript{224} See \textit{Hancock}, 426 U.S. at 178 (because enclave law is federal, the Supremacy Clause dictates that it supersedes state law).
provides that “the law of the [place] where the wrong occurred” governs an action.225

Similarly, the McGlinn doctrine dictates that when the “pertinent events” giving rise to a suit “occurred on a federal enclave” the court must apply the federalized state law applicable on the enclave.226 This is so notwithstanding the fact that the surrounding state usually possesses materially greater interests in the outcome of the litigation than the federal government.227

V. THE McGLINN DOCTRINE CONVERTS ENCLAVES INTO JURISPRUDENTIAL JURASSIC PARKS

While the Assimilative Crimes Act incorporates modern state criminal law, Congress has made little effort to update the body of private law applicable in its aging enclaves. As a result, federal enclaves — which encompass “[r]oughly thirty percent of land in the United States”228 — have devolved into jurisprudential Jurassic Parks, where long dead legal doctrines live on. The Presidio of San Francisco exemplifies this phenomenon.

California ceded exclusive jurisdiction over the Presidio to the federal

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227 See Evans v. Cornman, 398 U.S. 419, 425 (1970) (the “differences . . . between . . . residents that live on federal enclaves and those who [live in the surrounding state] are far more theoretical than real”).
228 Turley, supra note 23 at 362.
government in 1897 to establish an Army base. Today, the Presidio, now administered by the National Parks Service, is a bustling commercial center, home to thousands of people and the site of millions of dollars of commercial sales each year.

As a young attorney, I represented a pro bono client facing an action to evict him from his Presidio apartment. I successfully removed the case to federal court on the basis of federal-question jurisdiction because the law governing his suit was California’s 1872 unlawful-detainer statute, which lived on as “federalized state law.” Fortunately, my client did not assert that his landlord breached the implied warranty of habitability. California did not recognize the existence of such a warranty until 1974 and thus it is not a part of the body of law governing the Presidio. The prior rule — which originated in the Middle Ages — still prevails: “the lessor is not obligated to repair unless he covenants to do so in the written lease contract.” The eviction statute applicable on the Presidio does offer one potentially troubling advantage to tenants; unlike modern statutes, nuisance is not a valid ground for terminating tenancy.

Other proverbial dinosaurs roam the enclave. California eliminated the tort of

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229 Standard Oil Co. v. California, 291 U.S. 242, 244 (1934); Consolidated Milk Producers v. Parker, 19 Cal.2d 815, 816 (1942).
231 Levy, supra note 49 at A-1.
233 As “federalized” law, the “assimilated state [unlawful detainer] law [w]as distinctly federal in nature,” thus “its application establishe[d] the basis for federal question jurisdiction.” Id. at 1038. My client resided in federal housing. Id. at 1038 n.7. I removed the case to federal court because I planned to challenge his eviction on due-process grounds and I preferred to make this argument before a federal forum. This strategy proved successful. Swords to Plowshares v. Kemp, 2005 WL 3882063, *1-2 (N.D. Cal. Oct. 18, 2005).
236 Id. at 1076.
alienation of affections in 1939. Yet, this long-dead cause of action lives on in the Presidio as a sort of zombie tort. If one of the thousands of Presidio residents carried on an extramarital affair with a neighbor, her jilted spouse could sue her lover. If the paramour was himself engaged to another woman residing on the Presidio, his would-be bride could likewise sue him for breach of contract to marry. California also eliminated this cause of action in 1939. The Presidio’s enclave status would, however, afford the lothario wide latitude to retaliate for these suits that he would not enjoy in other parts of the city. The causes of action for intentional infliction of emotional distress and invasion of privacy do not exist on the enclave. California did not recognize the

240 Barlow v. Barnes, 155 P. 457, 457 (Cal. 1916).
241 Buelna v. Ryan, 139 Cal. 630, 631 (1903).
emotional-distress tort until 1950.\textsuperscript{243} It first recognized the privacy action in 1973.\textsuperscript{244}

The Presidio is home to a high-end bicycle shop.\textsuperscript{245} Bike sales conducted at the shop are not governed by the Uniform Commercial Code — which California did not adopt until 1965\textsuperscript{246} — but rather by nineteenth century common law. Sales would include no implied warranties, but rather would be subject to the doctrine of \textit{caveat emptor.}\textsuperscript{247} They would also be immune from California’s consumer-protection and false-advertising laws, which were not enacted until 1941.\textsuperscript{248} If a car struck the rider of a bicycle within the boundaries of the enclave, the driver could avoid liability for damage to the bike by simply demonstrating one percent of contributory negligence by the rider.\textsuperscript{249} California did not adopt the comparative-fault doctrine until 1975.\textsuperscript{250}

Perhaps most troubling of all, private companies employ several thousand workers at the Presidio.\textsuperscript{251} The enclave is the home of George Lucas’ special-effects studio, Industrial Light & Magic, which alone employs more than 1,500 people.\textsuperscript{252} California, like most states, provides significantly greater employment law rights and

\textsuperscript{246} Marguerite Lee De Voll, \textit{Comment: Neither “Free” Nor “Clear”: The Real Costs of In re PW, LLC: A Look at § 363(F)(3) and How To Protect Creditors}, 26 EMORY BANKR. DEV. J. 167, 186 (2009).
\textsuperscript{247} Watson v. Sutro, 86 Cal. 500, 525 (1890).
\textsuperscript{248} Mersnick v. USPROTECT Corp., 2007 WL 2669816, *4 (N.D. Cal. Sept. 7, 2007) (California consumer-protection law, Cal. Bus. & Prof. Code § 17200, inapplicable on federal enclave established before its enactment); \textit{see} Pfizer Inc. v. Superior Court, 45 Cal. Rptr. 3d 840, 843 (Cal. App. 2006) (noting that California’s consumer protection and false advertising statutes were enacted in 1941).
\textsuperscript{250} Li v. Yellow Cab Co., 532 P.2d 1226, 1229 (Cal. 1975).
\textsuperscript{251} Levy, \textit{supra} note 49 at A-1.
\textsuperscript{252} \textit{Id.}
remedies to workers than the federal government. Yet, Presidio workers — most of whom presumably reside outside the enclave — enjoy only the modest protections of laissez-faire nineteenth state labor laws simply because they work in a two square mile “island[] of federal jurisdiction” within the city of San Francisco. This is not an anomaly. The Presidio is just one of five thousand federal enclaves established by Congress throughout the United States. Collectively, these enclaves are home to more than a million people.

Much of the blame for this state of affairs lies with Congress. The rule of international law upon which Canter and McGlinn rest presupposes that upon accepting jurisdiction over territory, a new sovereign will promptly establish new laws to govern the territory. Existing municipal laws are intended only to serve as a stop-gap measure to prevent “a hiatus in the legal system of the [territory].” Incorporated laws are not meant to live into perpetuity. The new sovereign assumes an obligation to actually govern the territory. When the United States acquired Florida from Spain it promptly established a territorial legislature to govern the cession. “The power of Congress over federal enclaves . . . is . . . the same as the power of Congress over the District of

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253 Romer-Friedman, supra note 36 at 503, 508, 511, 516.
257 The Presidio remains a part of San Francisco notwithstanding its jurisdictional status. Howard v. Commissioners, 344 U.S. 624, 626-27 (1953).
259 Id.
261 See Board of County Comm’rs v. Donoho, 356 P.2d 267, 271 (Colo. 1960) (asserting that adoption of pre-existing state laws was intended to temporarily “fill the vacuum which would otherwise exist” in enclave private law).
Columbia.” When the federal government assumed jurisdiction over the District the laws of Maryland likewise lived on as federalized-state law. But Congress governed the District. Congress failed to provide such leadership for the multitude of other federal enclaves it established in the centuries that followed. As a result, nearly thirty percent of the United States has devolved into a “sanctuary for the obsolete restrictions of the common law . . .”

VI. THE McGLINN DOCTRINE HAS PERNICIOUS EFFECTS UPON LABOR LAW

Like other aspects of municipal law, state labor laws become “federalized” and are frozen in time at the moment a state cedes jurisdiction over an enclave to the federal government. In *James Stewart & Co. v. Sadrakula*, the Supreme Court affirmed the application of a New York workplace safety law on a federal enclave because the State enacted the law prior to the transfer of cession. But state labor acts enacted after jurisdiction is ceded to the federal government “are not a part of the body of laws in [an enclave]” because “Congressional action is necessary to keep it current.”

Today, virtually all state governments provide greater employment law rights and remedies than the federal government. As one commentator noted,

[t]here are four main circumstances where a worker is substantively better off under state law than under federal law, including when (1) the state law provides an affirmative right, but the federal government has no equivalent right; (2) the federal law exempts a

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266 Turley, *supra* note 23 at 362.
269 *Sadrakula*, 309 U.S. at 104-05.
270 *Id.* at 100.
271 Romer-Friedman, *supra* note 36 at 503.
worker from protection, but the state law has no exemption; (3) the state law standard is more rigorous than the equivalent federal standard . . . ; and (4) the state law provides a greater remedy or time period to recover than federal law.\textsuperscript{272}

The precise situations where state labor law affords employees greater rights and remedies than federal law are too numerous to chronicle in detail here. Nonetheless, a few notable examples merit discussion.

At least thirty two states guarantee employees a higher minimum wage than federal law requires.\textsuperscript{273} Several states give employees significantly greater rights to medical leave to care for ailing family members than federal law provides.\textsuperscript{274} Twelve states afford employees the right to receive benefits for dependents and domestic partners not provided by federal law.\textsuperscript{275}

\textsuperscript{272} \textit{Id.} at 503-04.

\textsuperscript{273} The federal minimum wage is $5.15 per hour. 29 U.S.C. § 206. At least thirty two states impose a higher minimum wage than required by federal law. ALASKA ADMIN. CODE tit. 8, § 15.105 ($7.25/hour); ARIZ. REV. STAT. § 23-363 ($7.25/hour); ARK. CODE ANN. § 11-4-210 ($6.25/hour); CAL. CODE REGS. tit. 8 § 11000 ($8.00/hour); 7 Colo. Code Regs. § 1103-1 ($7.28/hour); CONN. GEN. STAT. § 31-58(j) ($7.40/hour); DEL. CODE ANN. tit. 19 § 902(a) ($7.15/hour); D.C. CODE § 32-1003 ($7.00/hour); FLA. STAT. § 448.110 ($6.67/hour); HAW. REV. STAT. § 387-2 ($7.25/hour); 820 ILL. COMP. STAT. § 105/5 ($8.00/hour); IOWA CODE § 91D.1(1) ($7.25/hour); ME. REV. STAT. ANN. tit. 26, § 664 ($7.00/hour); MD. CODE ANN., LAB. & EMPL. §§ 3-413 ($6.15/hour); MASS. GEN. LAWS ch. 151, § 1 ($8.00/hour); MICH. COMP. LAWS §§ 408.384 ($7.15/hour); MINN. STAT. § 177.24 ($6.15/hour); MO. REV. STAT. § 290.502 ($6.50/hour); MONT. CODE. ANN. §§ 39-3-404(1) ($6.15/hour); N.J. STAT. ANN. § 34:11-56A4 ($7.15/hour); N.Y. LAB. LAW § 652(1) ($7.15/hour); N.C. GEN. STAT. § 95-25.3 ($6.15/hour); OHIO REV. CODE ANN. § 4111.02 ($6.85/hour); OR. REV. STAT. § 653.025 ($7.80/hour); PA. STAT. ANN. tit. 43 § 333.104 ($7.15/hour); R.I. GEN. LAWS § 28-12-3 ($7.40/hour); VT. STAT. ANN. tit. 21 § 384 ($7.53/hour); WASH. REV. CODE § 49.46.020 ($7.93/hour); W. VA. CODE § 21-5C-2 ($7.25/hour); WIS. STAT. § 104.01 ($6.50/hour).


\textsuperscript{275} CAL. LAB. CODE § 233; CONN. GEN. STAT. § 1-1m; HAW. REV. STAT. § 572C-6; KY. REV. STAT. ANN. § 402.045; ME. REV. STAT. ANN. tit. 24, § 2319-A; MD. CODE ANN. STATE GOV’T § 20-606; N.H. REV. STAT.
and Puerto Rico — among the national leaders in federal land holdings — require the payment of overtime to employees for work exceeding a designated number of hours per day, while federal law only requires overtime for work in excess of forty hours per week.

While federal law prohibits discrimination “based on race, sex, age, religion, national origin, and disability,” several states expand such protections to groups outside the ambit of federal law. The federal Occupational Safety and Health Act imposes minimum workplace safety requirements on all employers. But most states have opted to establish their own parallel statutes, many of which impose significantly more stringent safety standards and enforcement schemes than federal law requires.

In addition, many states that have opted not to impose more rigorous employment rules than federal law requires, nonetheless offer employees more significant remedies for violations of the federally mandated standards than federal law does. Because Congress established most federal enclaves prior to 1940, civilians employed on enclaves typically enjoy none of these rights. Nineteenth and early twentieth century legislatures and courts expressed open hostility to working people and those who sought

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276 Federal enclaves within Puerto Rico are subject to the same treatment as enclaves within the fifty states. Kelly v. Lockheed Martin Serv. Group, 25 F. Supp. 2d 1, 5 (D.P.R. 1998).


282 Romer-Friedman, supra note 36 at 504.

283 Most federal enclaves were established between 1840 and 1940. U.S. DEP’T OF JUSTICE, FEDERAL LEGISLATIVE JURISDICTION 49-50 (1969).
greater rights for laborers.\footnote{284 McKay v. Retail Auto. Salesmen's Local Union, 106 P.2d 373, 377 (Cal. 1940).}


George Lucas’ Presidio-based special effects studio, Industrial Light and Magic, itself has been subject to two discrimination suits premised upon California labor law.\footnote{286 Klausner, 2010 WL 1038228 at *4; Rosseter, 2009 WL 210542 at *2.} On both occasions, the courts dismissed the state-law claims because California enacted the applicable statutes after the federal government assumed jurisdiction over the Presidio.\footnote{287 Klausner, 2010 WL 1038228 at *4; Rosseter, 2009 WL 210542 at *2.}

As if to add insult to injury, the lower federal courts have unnecessarily compounded the problem by misreading precedent to bar state common-law remedies as well. As explained in Part I-C, \textit{supra}, the lower federal courts have uniformly misread the Supreme Court’s decision in \textit{Arlington Hotel v. Fant} to hold that state common-law rules, like statutes, freeze in time at the moment of cession until altered by Congress. This places enclave workers at a serious disadvantage vis-à-vis their counterparts employed outside federal boundaries.

Modern state common law typically affords victims of workplace harassment a
right to invoke the tort of intentional infliction of emotional distress to redress trauma stemming from abusive work environments.\textsuperscript{288} Because judicial recognition of this tort post-dates the establishment of virtually all federal enclaves,\textsuperscript{289} federal courts regularly deny enclave workers’ claims premised on this claim for relief.\textsuperscript{290}

A vast majority of States now recognize a cause of action for wrongful termination in violation of public policy.\textsuperscript{291} The state supreme courts first began to recognize these claims in the early 1980s.\textsuperscript{292} Prior to that time, such actions were strictly barred by the at-will employment doctrine.\textsuperscript{293} Courts routinely deny wrongful-termination claims by enclave employees cognizable under state law because such actions were not recognized at the time of cession.\textsuperscript{294}

A series of cases involving the dismissal of workers employed at California’s San Onofre Nuclear Generating Station illustrate the potential injustice of this precedent. In 1963, the Southern California Edison Company acquired an easement from the Secretary of the Navy to build the San Onofre station on the Camp Pendleton Naval

\textsuperscript{288} González, supra note 279 at 132-33.
\textsuperscript{289} Most federal enclaves were established between 1840 and 1940. U.S. DEP’T OF JUSTICE, FEDERAL LEGISLATIVE JURISDICTION 49-50 (1969).
\textsuperscript{292} Id. at 774 n.154 (noting that Sheets v. Teddy’s Frosted Foods, Inc., 427 A.2d 385, 386-87 (Conn. 1980) was one of the first decisions to recognize such this cause of action).
\textsuperscript{293} Id. at 708.
Reservation, a federal enclave near San Diego. The federal government acquired exclusive jurisdiction over Camp Pendleton in 1942. In the last five years at least three San Onofre employees brought suit alleging Southern California Edison terminate them in retaliation for reporting nuclear-safety violations at the station. One of the employees alleged Edison fired him in retaliation for reporting safety violations to the Nuclear Regulatory Commission. “The common law claim for wrongful termination in violation of public policy was first recognized” by the California courts “in 1959” — seventeen years after Camp Pendleton succumbed to federal jurisdiction. Thus, in each instance the federal courts dismissed the alleged whistle blowers’ actions because the common law wrongful-termination tort was not part of the enclave’s law.

Congress undoubtedly possesses a strong interest in seeing that military personnel and federal workers employed on federal enclaves are immune from state labor laws. Private employers like Southern California Edison and George Lucas — based on the mere happenstance of their locus on federal enclaves — deserve no such immunity. The immunity they presently enjoy stems not from a conscious decision to protect them, but rather from the federal government’s failure to “keep” enclave private law “current.” As a result of this abdication, Camp Pendleton and the Presidio’s enclave status afford Edison and Lucas protections that a squadron of imperial storm troopers would envy.

295 McMullen, 2008 WL 4948664 at *2.
296 United States v. Hernandez, 739 F.2d 484, 845 (9th Cir. 1984) (noting that Camp Pendleton is located forty miles north of San Diego).
297 McMullen, 2008 WL 4948664 at *2.
300 Cooper, 2006 U.S. App. LEXIS 11897 at *3-4.
301 Id. at *2; Bussey, 2009 U.S. Dist. LEXIS 14057 at *9-10; McMullen, 2008 WL 4948664 at *7-8. The San Onofre dismissals are of particular concern to me because I live within the plant’s fall-out zone.
302 James Stewart & Co. v. Sadrakula, 309 U.S. 94, 100 (1940).
VII. PROPOSED SOLUTIONS TO THE PROBLEMSPOSED BY THE *McGlinn* DOCTRINE

A. *Enclave Status Should Not Freeze a Territory’s Common Law*


Congress bears significant responsibility for the nonsensical state of the law governing federal enclaves. Notwithstanding this legislative abdication, the most confounding aspects of federal-enclave law could be remedied by the courts without the involvement of the political branches of government. The lower federal courts have uniformly misread the Supreme Court’s decision in *Arlington Hotel v. Fant* to apply *McGlinn*’s principle that existing laws remain in force indefinitely until altered by the new sovereign to apply to existing state common-law rules.\(^{303}\) None of the Supreme Court’s enclave decisions actually addressed the effect of the *McGlinn* doctrine on enclave common law.

The Enclave Clause empowers Congress to “exercise exclusive Legislation” over federal enclaves.\(^{304}\) But the Constitution is silent concerning the status of enclave common law. Precedent demonstrates that state courts necessarily lose their power to promulgate common-law rules for enclaves as each enclave is “to [the surrounding state] as the territory of one of her sister states or a foreign land.”\(^{305}\) But the Constitution does not compel that enclave common law must cease to evolve at the moment the federal government assumes jurisdiction. I posit that as federal instrumentalities, enclaves fall within the ambit of federal common law. History supports this position. “The power of Congress over federal enclaves . . . is . . . the same as the power of Congress over the

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\(^{303}\) See Part I-C, supra.


District of Columbia.” The laws of Maryland lived on as federalized-state law within the District until Congress abrogated them. Until Congress established the District’s own Court of Appeals in 1970, the equivalent of a state Supreme Court, the District was subject to federal common law promulgated by Article III judges. While the District’s population exceeds that of other federal properties, collectively many more people live or work within other enclaves than in the Capital. They deserve the same treatment as D.C. residents.

State regulatory authority over an enclave is extinguished at the moment of cession as the federal government assumes jurisdiction over the parcel. But as with the District of Columbia, the regulatory power assumed by the United States as the new sovereign should be divided between the branches of the federal government in the usual fashion. Congress assumes exclusive legislative jurisdiction and the federal courts should logically assume the common-lawmaking role traditionally occupied by the judicial branch. This is consistent with the rule of international law applied in *American Insurance Co. v. Canter* upon which the *McGlinn* doctrine is based.

*Canter* presumes “that whenever political jurisdiction” is “transferred from one nation or sovereign to another,” existing laws will remain in force indefinitely as the new

310 See Mirel, *supra* note 7 at B01 (“Millions of people live in so-called federal enclaves, those territories that have been purchased by, or ceded to, the federal government for use as military bases, national parks and other federal facilities.”); Thompson & Williams, *supra* note 7 at B02 (noting that “the millions of federal enclave residents enjoy congressional representation — by voting either in their home state or the state where the enclave is located”).
311 It should be noted that federal enclave residents do possess one important right not possessed by D.C. residents: the right to vote in congressional elections. Evans v. Cornman, 398 U.S. 419, 424 (1970).
sovereign assumes the functions previously performed by the outgoing government.\textsuperscript{312} The former sovereign’s laws live on for a time to prevent “a hiatus in the legal system of the [territory].”\textsuperscript{313} but the instrumentalities of the new sovereign’s administration may change them in any manner permissible within its system of government.\textsuperscript{314} In common-law countries, judges assume the primary responsibility for promulgating private law.\textsuperscript{315} Thus, when dominion over territory passes from one common-law jurisdiction to another, the new sovereign’s courts should inherit the common-lawmaking responsibility from those of the former, just as the new sovereign’s assembly inherits legislative responsibility from its predecessor.

When the United States achieved independence from Great Britain, each of the new states “received”\textsuperscript{316} “the common law of England [then] . . . in force” as “the rule of decision” in private-law cases until “altered” by their new governments.\textsuperscript{317} Independence divested the Crown and its courts of jurisdiction over the states, but this did not terminate the existing body of common law, nor did it freeze that law in time until changed by the legislative branches of the new state governments.\textsuperscript{318} The state courts assumed responsibility for maintaining the body of common law and the power to create new

\begin{itemize}
  \item \textsuperscript{313} Board of Supervisors v. United States, 408 F. Supp. 556, 564 (E.D. Va. 1976); accord James Stewart & Co. v. Sadarkula, 309 U.S. 94, 99-100 (1940).
  \item \textsuperscript{314} Sadarkula, 309 U.S. at 99 (state laws promulgated by state legislatures live on as federal law within enclaves until “abrogated by Congress”).
  \item \textsuperscript{315} Tomlinson, supra note 114 at 107.
  \item \textsuperscript{317} Michael G. Collins, Justice Iredell, Choice of law, and the Constitution – A neglected Encounter, 23 CONST. COMMENTARY 163, 169 (2006) (referring to Virginia’s Receiving Act acknowledging receipt of the English common law until abrogated); Bellia & Clark, supra note 316 at 29 (noting that each of the thirteen original states expressly acknowledged “receiving” the English common law as the rule of decision in private-law cases after obtaining independence from Great Britain).
  \item \textsuperscript{318} Bellia & Clark, supra note 316 at 29.
\end{itemize}
doctrines and abrogate rules promulgated by their English predecessors. In my view, when the federal government assumes jurisdiction from a state, existing state common law should live on as English common law did. The courts of the new sovereign — the federal government — should inherit responsibility for maintaining that body of law.

Adoption of the federal-common-law model I propose would obviate the bulk of the jurisprudential anomalies presented by the *McGlinn* doctrine. While state legislatures occasionally intervene to correct perceived deficiencies, both historically and in modern times, the vast majority of private-law development rests with the courts in their common-lawmaking function. Indeed, state legislatures have traditionally demonstrated “indifference” to the development of private law.

Recognition that enclave private law falls within the ambit of federal common law would empower federal courts to extinguish zombie-torts like alienation of affections and to place enclave citizens, like the civilian employees of the San Onofre power station, on equal footing with their counterparts employed outside the enclave’s borders. No federal policy is furthered by denying enclave residents and employees such rights. The “differences . . . between . . . residents that live on federal enclaves and those who [live in the surrounding state] are far more theoretical than real.”

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319 *Id.*
321 Peck, *supra* note 56 at 270.
322 Application of this principle would also put an end to the jurisprudential “crazy quilt” problem existing in enclaves consisting of tracts of land acquired at different times. *See* Part I-E, *supra.*
323 *Evans*, 398 U.S. at 425.

Matters falling within the ambit of federal common law “do not inevitably require resort to uniform federal rules.”\(^{324}\) Rather, as the Supreme Court has repeatedly recognized, when appropriate state common law may be “borrowed and applied as the federal [common law] rule for deciding the substantive legal issue at hand.”\(^{325}\) As the Court said in *United States v. Kimbell Foods, Inc.*, \(^{326}\) “[w]hether to [borrow] state [common] law or fashion a nationwide federal rule is a matter of judicial policy ‘dependent upon a variety of consideration always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.’”\(^{327}\)

Federal courts engaging in the common-lawmaking process must make a case-by-case determination whether to fashion a federal rule or borrow applicable state law. Matters that require law that is “uniform in character throughout the Nation necessitate formulation of controlling federal [common law] rules.”\(^{328}\) Conversely, “when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision.”\(^{329}\) Further, “apart from considerations of uniformity,” the reviewing court “must determine whether application of state law would frustrate specific [federal] objectives” and if so, the court “must fashion special rules solicitous to those federal interests.”\(^{330}\)

I do not contend that federal courts should “borrow” state common law in matters


\(^{327}\) *Id.* at 728 (quoting United States v. Standard Oil Co., 332 U.S. 301, 310 (1947)).

\(^{328}\) *Id.*

\(^{329}\) *Id.*

\(^{330}\) *Id.*
involving military personnel or government employees acting in their official capacities. But I posit that in the overwhelming majority of cases involving civilians or government officials acting in their private capacities, the Kimbell Foods factors weigh heavily in favor of “borrowing” the common law of the surrounding state. No need exists for a “nationally uniform body” of federal common law to govern suits between civilians arising on enclaves. The bulk of litigants involved in actions arising on enclaves are likely to be residents of the state encompassing the enclave. Thus, the surrounding state is likely to possess materially greater interests in seeing that the policy decisions underlying its common-law rules are applied to the litigants. Moreover, the litigants involved in these suits are much more likely to be aware of the private-law rules of the surrounding state than of post-hoc rules promulgated by federal courts.\textsuperscript{331}

\textit{Kimbell Foods’} final factor, barring “application of state law” that “would frustrate specific [federal] objectives,” may obviate against incorporation of state common law in a few cases. The courts will have to consider this issue, as \textit{Kimbell Foods} instructed, on a case-by-case basis.\textsuperscript{332} But the vast majority of private-law actions on federal enclaves trigger no federal interests — even when the litigants are federal officials. If a married ranger at Yosemite National Park carried on an affair with her supervisor, no federal interests would be “frustrated” if a court “borrowed” modern California law denying the ranger’s husband of the right to bring an action for alienation of affections.\textsuperscript{333} Similarly, allowing alleged whistleblowers employed by private

\textsuperscript{331} See Strass, \textit{supra} note 24 at 758 (criticizing McGlinn doctrine’s application of past state laws because “the cost of legal research would make most suits impractical, leaving . . . claims unenforceable due to financial necessity”).

\textsuperscript{332} \textit{Id.}

enterprises like George Lucas’ Industrial Light & Magic or Southern California Edison’s San Onofre nuclear plant rights of action for wrongful termination frustrate no “specific [federal] objectives” for the Presidio or Camp Pendleton.  

3. Federal Courts Should “Borrow” as Federal Common Law Subsequent State Statutory Enactments that Could Have Been Enacted by the State Courts

Courts bear responsibility for the overwhelming majority of private-law development. Nonetheless, legislatures do sometimes intervene to alter common-law rules. But usually legislative “tweaks” to the private law could have been made by the courts through the common-lawmaking process. For example, California abolished the tort of alienation of affections by statute. In other states, courts abolished the cause of action by judicial decision. Some states adopted the comparative-fault doctrine legislatively; in others courts adopted the rule. The implied warranty of habitability for residential dwellings was likewise adopted in different manners by different

334 Evans v. Cornman, 398 U.S. 419, 425 (1970) (noting that the “differences . . . between . . . residents that live on federal enclaves and those who [live in the surrounding state] are far more theoretical than real”).
335 Tomlinson, supra note 114 at 107.
336 Id.
jurisdictions.\textsuperscript{341}

For this reason, I posit that federal courts are empowered to adopt subsequent legislative modifications of the private law made by a surrounding state as federal common law governing an enclave so long as the modification at issue is of a type that could have been made by the state courts in the first instance. Thus, a federal court adjudicating an alienation of affections suit by a resident of the Presidio of San Francisco should pronounce the cause of action extinguished as a matter of federal common law, notwithstanding the fact that California abolished the tort legislatively. Similarly, a federal court considering the question of innkeepers’ liability at issue in \textit{Fant} could adopt, as federal common law, Arkansas’ subsequent statutory repudiation of the former strict-liability rule.\textsuperscript{342} The enactment and abolition of such causes of action fall squarely within the ambit of the courts’ common-lawmaking function. The “power” of the courts “to alter or amend the common law” constitutes a quintessential feature of Anglo-American jurisprudence.\textsuperscript{343}

Indeed, even comprehensive legislative modifications to the private law can be adopted as federal common law if state courts could have made those changes. Contract law consists mostly of a body of judge-made rules enacted over several centuries.\textsuperscript{344} Legislative changes to the body of contract law by definition could have been made by


\textsuperscript{342} \textsc{Arlington Hotel Co. v. Fant}, 278 U.S. 439, 446 (1929).


\textsuperscript{344} 1 \textsc{E. Allan Farnsworth, Farnsworth on Contracts} \textsection{} 1.5-1.7 (3d ed. 2004).}
the courts in the first instance.\textsuperscript{345} For this reason, federal courts deciding admiralty cases, which are governed by federal common law, have “borrowed” Article II of the Uniform Commercial Code when adjudicating cases involving contracts in goods.\textsuperscript{346} The courts are empowered to do so because the U.C.C. is consistent with the common law and its provisions could have been adopted by the courts in their common-law making capacity.\textsuperscript{347} In my view, federal courts adjudicating enclave-based contracts involving transactions in goods should likewise “borrow” the provisions of the U.C.C. applicable in the surrounding state as federal common law.

As the courts noted “borrowing” the U.C.C. for admiralty cases, incorporation of the Code into contracts governed by federal common law serves the “goals of uniformity and predictability.”\textsuperscript{348} This is all the more true in the case of enclave-based contracts because the transacting parties are most often residents of the surrounding state.\textsuperscript{349}

\textbf{B. Congress Should Enact a Federal Assimilative Labor Act}

While most of the private law anomalies created by the \textit{McGlinn} doctrine can be remedied by incorporation of contemporary state private law as federal common law, some state legislation falls outside the ambit of a court’s common-lawmaking authority.

Many aspects of modern state labor codes such as wage and hour provisions and

\begin{footnotesize}
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\item \textsuperscript{345} See Grant Gilmore, \textit{Article 9: What It Does for the Past}, 26 LA. L. REV. 285, 285-86 (1966) (arguing that the U.C.C. fits neatly within and should be thought of as part of the body of the common law of contracts).
\item \textsuperscript{346} E.g., Princess Cruises v. General Elec., 143 F.3d 828, 832 (4th Cir. 1998); Southworth Mach. Co. v. F/N Corey Pride, 994 F.2d 37, 41 n.3 (1st Cir. 1993); Interpool Ltd. v. Char Yigh Marine, S.A., 890 F.2d 1453, 1459 (9th Cir. 1989), \textit{amended}, 918 F.2d 1476 (9th Cir. 1990); Clem Perrin Marine Towing, Inc. v. Panama Canal Co., 730 F.2d 186, 189 (5th Cir.), cert. denied, 469 U.S. 1037, 83 L. Ed. 2d 405, 105 S. Ct. 515 (1984).
\item \textsuperscript{347} See Gilmore, supra note 345 at 285-86 (arguing that the U.C.C. fits neatly within and should be thought of as part of the body of the common law of contracts).
\item \textsuperscript{348} \textit{Princess Cruises}, 143 F.3d at 832.
\item \textsuperscript{349} See Evans v. Cormlan, 398 U.S. 419, 425 (1970) (the “differences . . . between . . . residents that live on federal enclaves and those who [live in the surrounding state] are far more theoretical than real”).
\end{itemize}
\end{footnotesize}
workplace safety ordinances could not have been adopted by the courts in the first instance. Thus, such ordinances cannot be incorporated as federal common law. To remedy inequities resulting from the inapplicability of state labor laws on federal enclaves, I modestly propose that Congress enact a statute in the vein of the Assimilative Crimes Act, making contemporary state labor and employment statutes applicable to non-government workers employed on federal enclaves.

As the Sharpnack Court recognized, Congress can choose to adopt existing and future state law into the body of law applicable within enclaves.\(^{350}\) Using the Federal Reservations Act which makes state wrongful-death statutes applicable on enclaves\(^{351}\) as a reference, I propose Congress enact the following:

**Extension of state labor and employment laws to buildings, works, and property of the Federal Government.**

(a) Subject to the limitation enumerated in subsection (b), civilians employed by private enterprises within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, shall possess the same rights and remedies accorded by the labor and employment laws of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of violation of such laws the rights and remedies of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be.

(b) A State labor or employment law otherwise applicable under subsection (a) will be inapplicable within a national park or other place subject to the exclusive jurisdiction of the United States if application of such law would unduly burden specific federal objectives for the place.

Like the Assimilative Crimes Act, my proposal would constitute “a deliberate continuing adoption by Congress for federal enclaves” of labor and employment laws “as shall have been already put in effect by the respective States for their own


government.” It thereby places non-government workers employed on a federal enclave on par with their counterparts employed outside the enclave. Subsection (b) provides a safe harbor analogous to that offered by *Kimbell Foods* enabling courts to decline to apply a state labor law if doing so “would frustrate specific [federal] objectives” for the enclave.

In the overwhelming majority of cases, no federal objective justifies immunizing private employers such as George Lucas’ Industrial Light & Magic from state employment laws. The immunity presently enjoyed by enclave-based enterprises exists only because of an historical accident. Congress should remedy that mistake as it previously did, making contemporary criminal, wrongful death and workers’ compensation statutes applicable within enclaves.

**CONCLUSION**

To many, the term “federal enclave” conjures images of distant military outposts on untamed frontiers. This is not an accurate picture. Over the last century, many enclaves evolved into bustling commercial centers, often lying within major metropolitan areas. Federal enclaves encompass a whopping 659 million acres — nearly “thirty percent of land in the United States.” Millions of civilians live in, work or pass through them every day — most unaware of the potential legal consequences of doing

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352 *Sharpnack*, 355 U.S. at 293-94.
355 *Turley*, *supra* note 23 at 362.
356 See Mirel, *supra* note 7 at B01 (“Millions of people live in so-called federal enclaves, those territories that have been purchased by, or ceded to, the federal government for use as military bases, national parks and other federal facilities.”); Thompson & Williams, *supra* note 7 at B02 (noting that “the millions of federal enclave residents enjoy congressional representation — by voting either in their home state or the state where the enclave is located”).
so. Millions of dollars of commercial transactions take place on enclaves every year.\textsuperscript{357}

The *McGlinn* doctrine relegates these places to the status of jurisprudential Jurassic Parks, reanimating extinct legal precepts to wreak havoc on unwary citizens. Zombie-doctrines like the tort of alienation of affections and caveat emptor lurk in the shadows, while modern innovations like implied warranties and the Uniform Commercial Code do not exist. Worse yet, enclave status denies relief to millions of state residents under progressive state labor statutes enacted in the latter half of the twentieth century.

Much of the blame for this state of affairs lies at Congress’ feet. The rule of international law upon which the *McGlinn* doctrine rests presupposes that upon assuming jurisdiction a new sovereign will establish new laws to govern the territory. Existing municipal laws are intended only to serve as a stop-gap measure to prevent “a hiatus in the legal system . . . .”\textsuperscript{358} They are not meant to live into perpetuity. The new sovereign assumes an obligation to actually govern the territory. Congress failed to fulfill this duty.

Even greater responsibility rests with the federal courts. The vast majority of private-law development rests with the courts in their common-lawmaking function.\textsuperscript{359} Federal acquisition should not freeze enclave common law at the moment of cession. As federal instrumentalities, federal courts must assume the responsibility to promulgate federal common law to govern enclave-based private-law disputes. The courts have failed in this duty despite the fact that it imposes only de minimis responsibilities. The Supreme Court’s decision in *Kimbell Foods* empowers the lower federal courts to simply

\textsuperscript{357} Levy, *supra* note 49 at A-1.
\textsuperscript{359} Tomlinson, *supra* note 114 at 107.
“borrow[]”\textsuperscript{360} ready-made state common-law rules in cases where “there is little need for a nationally uniform body of law.”\textsuperscript{361} Because the “differences . . . between . . . residents that live on federal enclaves and those who [live in the surrounding state] are far more theoretical than real,” in the overwhelming majority of cases no federal need exists for a uniform body of enclave common law.\textsuperscript{362}

Application of “borrowed” state common law rules as federal common law would cure the bulk of the jurisprudential anomalies inflicting enclaves. Nonetheless, many provisions of state labor codes — particularly wage and hour and workplace safety regulations — lie beyond the ambit of the courts’ common-lawmaking authority. For this reason, I propose Congress utilize the familiar mold of the Assimilative Crimes Act to enact a statute applying contemporary state labor and employment laws to federal enclaves. Until Congress and the federal courts heed this advice, the nation’s federal enclaves will continue to wallow in a state of continuous entropy, devolving into “grave yard[s] for the burial of . . . humane legislation.”\textsuperscript{363}


\textsuperscript{361} Kimbell \textit{Foods}, 440 U.S.at 728.

\textsuperscript{362} \textit{Evans}, 398 U.S. at 425.